In any event, the Commission's own policies already prohibit any cellular carrier from restricting resale or discriminating between resellers and other customers. A reseller who believes a carrier has violated those policies has a complete remedy through Sections 201, 202 and 208 of the Communications Act. The Commission has repeatedly confirmed it will vigorously enforce carriers' resale obligations.[16] Given the Commission's own policies, state regulation of carrier-reseller relations cannot be "necessary" under Section 332. Worse, it would perpetuate the haphazard regulatory structure Congress wanted dismantled. Thus, the relationships of Bell Atlantic and Springwich with independent resellers cannot supply a legal basis to grant the DPUC's petition.

The DPUC makes assertions that resellers are subject to "coercive tactics." These are discussed and rebutted in Appendix A at 19-21. For example, the Petition states that the DPUC has concluded "that Springwich, in particular, has utilized coercive tactics in its dealings with its customers, the Resellers." Petition, at 3. This implies incorrectly that Bell Atlantic, the other cellular carrier, also was found to have used coercive tactics despite the fact that there was no evidence offered in the Decision to that effect. With regard to Springwich, the statement misrepresents the record. In the Decision, the DPUC states that there is evidence of coercion, characterized as an "allegation," and that "[t]his allegation of anti-competitive behavior by Springwich warrants further review by the Department."

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[16] See Section 22.914(a); Cellular Resale Policy, 6 FCC Rcd. 1719 (1991); Continental Mobile Telephone Co. v. Chicago SMSA Limited Partnership, FCC 94-50 (Mar. 16, 1994).

Decision at 27. The purported evidence was pure speculation, and no factual finding of "coercive tactics" was ever reached. (Appendix A at 21.)

Another purported example of the existence of anti-competitive practices is Springwich's requirement that interstate long distance calls be carried by its affiliate SNET America. Petition at 3. Yet the DPUC only found that this requirement conflicts with the "spirit of competition." Decision at 27. Nothing in the Decision or Petition links this practice to unjust and unreasonable retail (or for that matter wholesale) rates. In addition, SNET's practice is hardly unique -- it is used by virtually all non-BOC cellular carriers which are not subject to "equal access" obligations. (Bell Atlantic must provide equal access, again presenting a competitive choice to end users in Connecticut.) The Commission has just commenced a proceeding to decide whether and to what extent all cellular carriers must offer equal access,[17] a decision which may affect SNET's practice. The DPUC's intervention on equal access would interfere with an area in which the Commission must adopt national rules.

The Petition also purports to find "credible" additional allegations of resellers. Petition at 3-4. However, no findings were made in the underlying Decision concerning alleged tariff violations, liens, confidentiality agreements and problems with dropped calls. See Decision at 30-32. For these allegations, the

[17] Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54 (FCC 94-145).

Decision does not even conclude that there were grounds for further investigation. Id.

The DPUC repeatedly seeks to put the worst light on the record, even when the record proved unfavorable to its desire to retain regulatory control. For example, the DPUC concluded that "the record is devoid of any comments or information concerning customer satisfaction with services offered by CMRS providers." Decision at 32. This is grossly misleading. The record showed that no cellular customer has ever complained in this or any other proceeding before the DPUC or the Connecticut Office of Consumer Counsel. The agency has a Consumer Assistance Division with a toll-free number that accepts complaints about utility services. It has no record of any complaints from cellular customers. (Appendix A at 25-26.)

The DPUC has largely ignored the evidence supporting deregulation, failed to explain its departure from its prior decisions (including those approving the very tariffs which the Decision now criticizes), and provided lengthy recitations of allegations by the proponents of continued regulation with no real analysis or findings but rather only a call for further investigation. However, its past and current proceedings indicate that the CMRS markets are competitive. And, given that there is no evidence of market conditions which fail to protect subscribers from unfair and unreasonable rates, there is no basis to authorize continued wholesale cellular rate regulation in Connecticut.

VI. CONCLUSION

For the above reasons, the DPUC's Petition should be promptly denied.

Respectfully submitted,

THE BELL ATLANTIC METRO MOBILE COMPANIES

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Dated: September 19, 1994

APPENDIX A

ANALYSIS OF AUGUST 8, 1994 DECISION OF THE CONNECTICUT DEPARTMENT OF PUBLIC UTILITY CONTROL, DOCKET NO. 94-03-27

On August 8, 1994, a panel of three Commissioners of the Connecticut Department of Public Utility Control ("DPUC") approved a 33-page decision ("Decision") in Docket No. 94-03-27 in which the DPUC determined to petition the Federal Communications Commission ("FCC") to retain jurisdiction over bulk wholesale cellular service rates and charges under Section 332(c)(3)(B) of the Communications Act of 1934, as amended by the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"). The DPUC chose to organize its Decision by presenting evidence as to each of the eight "non-exhaustive list of examples of the types of evidence, information and analysis that may be considered pertinent to determine market conditions and consumer protection" suggested by the FCC as relevant to a petition for continuation of authority to regulate rates. 47 C.F.R. § 20.13(a)(2).

The purpose of the following analysis is to provide the FCC with information and assistance in evaluating the DPUC's Decision. This analysis will show that evidence cited by the DPUC as to each of the FCC's eight evidentiary criteria fails to support the State's petition for continued ratemaking authority, and that accordingly the State has not met its burden of proof under the Budget Act.

(i) The number of commercial mobile radio service providers in the state, the types of services offered by commercial mobile radio service providers in the state, and the period of time that these providers have offered service in the state.

The Decision reports on the local CMRS market participants, the services that they offer and, where available, how long they have been present in the market. However, the DPUC does not rely on this information to support, in any respect, its Petition to continue rate regulation. In fact, this information supports deregulation because of the number and diversity of Connecticut's CMRS providers. Indeed, despite its small geographic size, Connecticut ranks in the top ten percent of markets for telecommunications services, is number one in the United States in per capita income, and is especially attractive for new market entrants because of its location in the New York-Boston corridor and its concentrated population. (Tr. 52.)[1] The Decision also does not acknowledge, under this criterion, that 100 percent of the Connecticut cellular markets have competition between the A-band and B-band carriers, although that fact is made clear in the DPUC's Petition. See Petition at 2.

Notwithstanding these existing CMRS market participants and the proposed new entrants discussed in the Decision, the Petition refers the Commission only to the Connecticut regulations giving the DPUC authority to regulate wholesale cellular rates. The DPUC has no jurisdiction to regulate

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[1] References to the record before the DPUC are generally to the transcript ("Tr.", which was sequentially paginated so that there is no need to refer to individual hearing dates) or occasionally to interrogatory responses or so-called late-filed exhibits submitted during the hearings ("Late-filed Ex.").

cellular resellers or any other CMRS providers, whether existing or new entrants such as PCS and ESMR. The Decision does not acknowledge this gap in the DPUC's powers. Nor does it discuss how, under state law and the Budget Act, the regulation of wholesale cellular, but no other, CMRS providers would comport with Congress' goal of regulatory parity.

Finally, the DPUC indicates in its discussion of this criterion that there are at least 15 unregulated retail cellular service providers. Six of those resellers are affiliated with the cellular carriers (Linx (for SNET/Springwich) and the five Metro Mobile/BAM companies), while nine are independent. Of those nine, three resellers, two of which are affiliated, were the only complaining resellers before the DPUC. The Decision does not comment on the apparent disinterest in continued State regulation by the majority of resellers.

(ii) The number of customers of each commercial mobile radio service provider in the state; trends in each provider's customer base during the most recent annual period or other data covering another reasonable period if annual data is unavailable; and annual revenues and rates of return for each commercial mobile radio service provider.

Dr. Jerry A. Hausman, the MacDonald Professor of Economics at Massachusetts Institute of Technology and a consultant to the telecommunications industry since 1974, provided the DPUC with calculations of returns on equity and total investment under a variety of methodologies, based upon certified historic financial statements from BAM and Springwich as well as extensive budgets, forecasts and projected financial information. (See, e.g., Response to Interrog. TE-

3, Late-filed Exs. 2, 3, 4, 5, 7, 15, 16 and 17; Hausman Statement at 5-6.) In particular, Late-filed Exs. 4 (Springwich) and 16 (BAM) included historic and projected operating revenues and expenses, property taxes and state and local income taxes, interest expense, gross and net investment and, in the case of BAM, investment in deferred cellular license and start-up costs. Springwich's information utilized actual data for 1990-1993, budget year 1994, and forecast years 1995-1999. For BAM, the data included actual years 1991 and 1992, estimated 1993, budget year 1994, and forecast year 1995.

The Decision ignored most of these data, and looked only at historic data from 1988 (BAM's predecessor's first full year in the Connecticut market) through 1993. It did not look at projected returns for 1994 or thereafter on the basis that they were "speculative" and that technological changes and the emergence of other service providers such as PCS and ESMR supposedly would have uncertain impacts on the carriers' future returns. Decision at 10. The Decision then finds that Springwich and BAM may have earned excessive rates of return. This finding was based on an exhibit which was prepared by a witness for the resellers, which distorted the cellular carriers' certified historic financial statements and projections in various respects. These include the arbitrary reduction of the amount of income taxes paid, the exclusion of construction work in progress from invested capital (without providing for any offsetting allowance for funds used during construction), the addition of additional revenues to the carriers' own projections and, in the case of BAM, the exclusion of its entire investment in

deferred cellular license and start-up costs (which is not an acquisition adjustment). See Hausman Statement at 5. Most incredibly, in the case of Springwich, the exhibit actually substituted BAM's lower operating expenses for those of Springwich in the income statements.[2]

When the actual, reported financial of Springwich and BAM are utilized, post-tax rates of return for the years 1991 through 1993 (which is the most relevant period when full competition existed between the two carriers) fell in some cases into single digits, and in no case exceeded a 15 percent return on total investment (let alone the higher market-required return on equity). See Id. That 15 percent return was the standard recommended by the resellers' expert, as well as by the Connecticut Office of Consumer Counsel ("OCC") and Attorney General, which each favored continued rate regulation. (Late-filed Exs. 33, 36.) While the DPUC chose to ignore post-1993 projected data, those data showed that the inadequate historic returns on equity of the two carriers will fall precipitously. (Id.) Thus, Dr. Hausman's computation of rates of return for the cellular carriers in Connecticut demonstrates that they are earning competitive rates of return that are in the range, or even below, rates of return permitted by the Commission for

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[2] The most complete description of the regulatory rate of return analyses that were made available to the DPUC, including Dr. Hausman's straightforward calculation of the wholesale carriers' after-tax rates of return on equity investment based upon audited financial statements and management projections, as well as the deficiencies in methodology and manipulations to reported data undertaken by the witnesses for the resellers, is set forth in Dr. Hausman's appended statement. (Appendix B to Bell Atlantic's Opposition). Bell Atlantic will supply all of the underlying material to Commission staff if the staff would like to review it.

the LECs. Hausman Statement at 6.

For all this, however, the DPUC states instead that "the record of this proceeding is inconclusive relative to the cellular carriers rate of return and their financial performance since 1987." Decision at 11 (emphasis added). Because the DPUC evades making any finding as to the cellular rates of return, it states that it plans to initiate a new regulatory proceeding to review and address those rates of return, determine an "appropriate" rate of return and use that information to establish "appropriate bulk wholesale cellular rates that may be imposed during the interim period between the present and the point at which market conditions warrant the DPUC's forbearance from rate regulation." Id. BAM's and Springwich's earned returns on equity were below anyone's reasonable estimate of what an appropriate return on equity would be for a wholesale cellular carrier during all relevant periods. See Hausman Statement at 6.

The Decision fails to address at all the first two parts of Section 20.13(a)(ii). In fact, the record indicates that Connecticut's wholesale cellular market has been characterized by high growth, significant network investment, expanding service coverage, declining prices and intense competition between BAM and Springwich over the past five years. (Tr. 48-49.) End-use customer growth in the Connecticut cellular service market has averaged approximately 40 percent annually, and changing market shares between the wholesale carriers demonstrates very active competition for those new customers. (Tr. 51.) Presently, there are approximately 188,000 total cellular end-users in Connecticut, with BAM's market

share at 54 percent and Springwich at 46 percent. (Tr. 64.) Dr. Hausman testified that the rapid growth in the Connecticut market and acceptance by the public of cellular service are important indicators that the Connecticut market is competitive. (Tr. 601.)

(iii) Rate information for each commercial mobile radio service provider, including trends in each provider's rates during the most recent annual period or other data covering another reasonable period if annual data is unavailable.

and

(vii) Evidence, information, and analysis demonstrating with particularity instances of systematic unjust and unreasonable rates, or rates that are unjust or unreasonably discriminatory, imposed upon commercial mobile radio service subscribers. Such evidence should include an examination of the relationship between rates and costs. Additionally, evidence of a pattern of such rates, that demonstrates the inability of the commercial mobile radio service marketplace in the state to produce reasonable rates through competitive forces will be considered especially probative.

The Decision addresses these two criteria together. Despite its reliance on historic rates of return, the DPUC considered only information regarding rate changes and adjustments by BAM and Springwich beginning in March 1993. Decision at 11-12. The DPUC refused to conclude that the carriers' many price reductions and promotions demonstrate that competition exists in the cellular market, and attempts to explain its refusal by claiming that it could not determine "the number of cellular numbers activated that can be specifically attributed to these promotions" or the impact that rate reductions have had on the "level of competition in the Connecticut marketplace" or the effect on "bulk wholesale cellular service subscribers." Id. at 13.

In a further effort to diminish the obvious competitive significance of the carriers' price promotions and reductions, the DPUC claims that the carriers' retail affiliates experience the greatest benefits from the promotions and reductions because they are bigger than the independent resellers and thereby are able to take advantage of larger volume discounts that had been approved by the DPUC itself. The Decision seems to blame the wholesale carriers for the success of their retail affiliates while, at the same time, totally ignoring that all resellers and end-users also can benefit from wholesale price reductions and promotions. Id. at 13-14.

Since 1987, Springwich has had five significant tariff revisions, eleven promotional offerings, and its effective rates have been lowered five times. Since its predecessor's initial rates became effective in June 1987, BAM, like Springwich, has offered new discounts to resellers based upon volume and length of service, first lowered and then eliminated the monthly minimum usage for each activated number, and offered promotions suspending charges for service establishment and activation. In August 1993, BAM reduced its monthly access charge per number from $20.00 to $14.00 while decreasing peak usage charges. In July 1994, BAM again lowered its monthly access charge from $14.00 to $10.50, thereby decreasing its monthly access charges by almost 50 percent since the DPUC's 1991 decision finding that price competition existed between BAM and Springwich. The DPUC also does not acknowledge that the Connecticut wholesale carriers have never increased their wholesale rates, are still charging well below

the maximums allowed in their min/max tariffs, have introduced new services, have reduced or eliminated other cost factors from their tariffs, and have substantially improved coverage throughout all relevant periods. (See, e.g., Response to Interrog. TE-17-11c (Springwich); Tr. 474-76, 546-49, 1693-95, 1709.)

It is ironic that the DPUC would seize upon the bulk volume discounts in its approved wholesale tariffs to claim that the carriers' retail affiliates are getting more benefit from these wholesale price reductions than other resellers. This misplaced concern ignores the fact that wholesale price reductions and promotions ultimately benefit the end-users of cellular service. Also, the bulk tariff has been designed to be volume-driven since 1984. The DPUC has reviewed those discounts, and in each of the cases brought before it, has agreed with the carriers that there is nothing discriminatory about volume discounts, finding that they represent typical wholesale pricing and are applied indiscriminately to all resellers. (Tr. 253-54.)

However, the DPUC candidly admits that it can reach no conclusion on the reasonableness of Connecticut's bulk wholesale cellular rates. Decision at 14-15. Instead, the DPUC states that it plans to conduct an investigation as to whether rates are in fact just and reasonable and protect subscribers. Thus, the DPUC admits that the State cannot now meet its burden of proof for continued rate regulation. Whether the DPUC wishes to conduct additional investigations extending for some indeterminate period into the future is irrelevant to whether it has met its current burden, required prior to August 10, 1994, that rate

regulation should be grandfathered in Connecticut because of unique market conditions.

Finally, looking particularly at the types of evidence called for under criterion (vii), there is no finding in the Decision of systematic unjust and unreasonable rates or discriminatory rates, and there was no evidence of any pattern of rates demonstrating the inability of the Connecticut CMRS marketplace to produce reasonable rates through competitive forces. Indeed, there is no analysis in the Decision of CMRS rates other than wholesale cellular tariffs.

(iv) An assessment of the extent to which services offered by the commercial mobile radio service providers the state proposes to regulate are substitutable for services offered by other carriers in the state.

In discussing this criterion, the DPUC errs again. DPUC concludes that, notwithstanding the fact that there is robust competition among the two cellular carriers, that a duopoly is per se not sufficiently competitive to relinquish the State's regulatory powers. That conclusion is evidenced by the DPUC's finding that "real" competition will not exist until the DPUC is satisfied (possibly in a proceeding it plans to open in July 1996) that PCS and ESMR service providers are fully operational in Connecticut and taking market share from the cellular carriers. Decision at 15, 17-19, 22 (Findings of Fact 18, 19).

The DPUC concludes that existing CMRS services in Connecticut such as SMR and paging are not competitive substitutes for cellular telephone service

because they are not capable of interconnecting to the public switched network. Id. at 17. This conclusion directly conflicts with the Commission's own determination, in the Second Report and Order that paging and SMR licensees are CMRS because, inter alia, they are interconnected to the public switched network. Importantly, the Commission has determined that a mobile service is interconnected if it allows subscribers either to send or receive messages to or from anywhere on the public switched network. Thus, both direct and indirect interconnection with the public switched network as well as utilization of store-and-forward technology qualifies as "interconnection." Accordingly, the DPUC's definition of interconnection directly conflicts with the Second Report and Order in its conclusion that the only "substitutable" services for cellular are those which allow "immediate two-way communications" (i.e., telephone service). Decision at 17.

The Decision also ignores the admitted robust existing competition between the Connecticut wholesale cellular carriers. Obviously, the services that they provide are substitutable with one another, and their service areas overlap throughout the State, which clearly is relevant to this evidentiary criterion. Also, during oral argument Commissioner Thomas M. Benedict, Chairman of the panel of Commissioners that issued the Decision, commented as follows to an objection by counsel for Springwich that the DPUC failed to acknowledge that competition between Springwich and BAM was robust:

> I don't think that the Department has concluded that competition between Linx and Bell Atlantic or

> SNET/Springwich whichever name we are using today, is not robust, but the question is: Is it robust in a manner that protects the consumer? I think you're probably correct that you two companies [Springwich and BAM] are slugging it out among yourselves, but is it in the best interest of the consumers?

(Tr. 1745-46, emphasis added.) Similarly, at the special meeting of the DPUC on August 8 to vote to adopt the Decision (no transcript was made of that meeting), Commissioner Benedict conceded that the thrust of the hearings centered on the potential arrival of new service providers such as ESMR and PCS, and twice stated that with only two cellular carriers in the market, there is not adequate competition to warrant relinquishing regulation. He added that the market would be reevaluated in 1996 so that, if competition develops as predicted from new providers, "there might be a different decision."

Because the DPUC utilizes a much more narrow definition of competition and substitutability than does the Commission, and because it determined that the robust competition among the Connecticut cellular carriers was irrelevant because they are a duopoly, the DPUC concludes that only when ESMR service providers' networks are fully operational, or when actual competition materializes from PCS technology, will there be substitutable services that would warrant deregulation of the rates of the cellular carriers. Decision at 17-19. The DPUC does not expect the competitive threat from these emerging digital wireless providers to be significant until at least July 1996, which it has established in the Decision as its date for commencing a proceeding to reconsider the status of competition with the cellular carriers. Id. at 19.

However, the DPUC completely ignores the competitive significance of services that are just now available or soon will be available such as ESMR and PCS. The DPUC fails to recognize the fundamental economic principle that competition takes place at the margin. Hausman Statement at 8. Despite the small new market shares that services have or will soon have, their entry has a tremendous effect. See Id. Reliance on market shares to evaluate the competitive impact of entry is overly simplistic and underestimates the entrants' effect on rates. Id. at 8-9.

Further evidence that the Decision gives no weight to competition within the wholesale cellular duopoly is its misplaced reliance upon Herfindahl-Hirshman indices ("HHIs"), which are, even according to the resellers' witness, utilized to determine whether mergers and consolidations should be permitted and market concentrations allowed to increase, and not to determine whether an industry should be regulated. (Tr. 782-83.) According to the Decision, HHI calculations that are based on minutes of two-way voice wireless telecommunications show that the Connecticut CMRS marketplace is highly concentrated and will remain so until the year 2003. Decision at 18. However, it is apparent from the Decision itself that calculating HHIs on the basis of minutes of wireless two-way use in a market that has been established by the Commission as a cellular duopoly will necessarily result in an index of approximately 5,000 until PCS or ESMR captures a significant part of the market. Such an index, of course, proves nothing other than the fact that the wholesale cellular market is a duopoly, which does not

prove that the market is non-competitive. See Cellnet Communication, Inc. v. FCC, 965 F.2d 1106, 1112 (D.C. Cir. 1992). Thus, the HHI is not an appropriate indicia to determine whether to permit state rate regulation because it does nothing but restate the obvious conclusion that the cellular market is a duopoly. However, if the HHI is used, it should at the very least be calculated to include the differential capacity of each service to foster competition. Dr. Hausman devised such a supply-based HHI considering spectrum capacity, showing that the entrance of ESMR and PCS will decrease the CMRS market concentration to about 1195, which is at the very low end of the moderately concentrated range (1000-1800). Hausman Statement at 9.

In this regard, the Decision conflicts with the Budget Act. Because all U.S. markets have cellular duopolies, all would have "highly concentrated" HHIs if calculated on the basis of minutes of two-way wireless use, and none would have, in the DPUC's definition, "substitutable" services. Nevertheless, Congress has determined to deregulate CMRS to promote competition, rather than to wait for full deployment of the new digital competitors to cellular. The Commission must find something more than the existence of a cellular duopoly in the local market to support continued regulation of CMRS providers. In deciding to wait for some undefined level of "effective" competition with the cellular carriers from new digital mobile services such as PCS and ESMR, the DPUC attempts to introduce a new and looser standard for regulation in direct conflict with the Commission's rules and the Act.

(v) Opportunities for new providers to enter into the provision of competing services, and an analysis of any barriers to such entry.

The DPUC's response to this evidentiary criterion, as in the case of the previous one, proves nothing other than that there is a cellular duopoly in Connecticut just as in every other state. See, e.g., Decision at 21. The Decision declines to recognize Commission licenses for PCS non-voice services as competitive because they do not provide "two-way voice communication," and also concludes that delays inherent in constructing PCS networks and building a customer base will preclude "effective competition in the CMRS market" for "some period of time." Id. at 21.

As for ESMR, the DPUC ignored unrefuted testimony by witnesses from Springwich and BAM that Nextel is already developing its Connecticut network and has over 20 tower site locations, a number of which come from existing SMR businesses that are in the process of being acquired or have been acquired by Nextel. Nextel already has more sites than Springwich had when it commenced cellular business in Connecticut. (Tr. 57-58.) Nextel is expected to begin operations in Connecticut in the beginning of 1995. (Tr. 471.) Despite this evidence, the DPUC concluded that ESMR providers "like PCS, will require time to build their respective customer bases in order to effectively compete." Decision at 21.

Indeed, the Decision even attempts to argue that Nextel's advanced digital technology is at a competitive disadvantage. The record before the DPUC

demonstrated that the Nextel phones will allow two-way voice, data, and messaging services interconnected to the wireline network, and thereby will provide more services than today's cellular phones. Nextel can provide a text message on its phone's display screen and can integrate both paging and the voice functions of the phone, allowing customers to have messages sent to them as well as to allow two-way voice communications. (Tr. 208-12.) The Decision, however, inexplicably concludes that "one factor that may stifle competition from Nextel, at least initially, is its plan to use single mode, digital phones." Decision at 21-22.

Finally, the DPUC claims that the high cost of PCS licenses is likely to slow down deployment of PCS systems and technologies. Decision at 21-23. Such a finding turns the economics of telecommunications investment on its head. The large investments that are being made to purchase spectrum assure a strong commitment by the successful bidders to move forward quickly in order to expedite recovery of their capital. Additionally, testimony before the DPUC indicated that there would be many well-capitalized players as a result of the PCS auction process, including RBOCs, out-of-area cellular carriers, cable companies, and inter-exchange carriers. (Tr. 390-92.) As noted above, Connecticut is an especially attractive market for such strong entrants, and has received special attention from Nextel because of its location in the New York-Boston market corridor, its dense population, and favorable demographics. Equally rapid deployment in the attractive Connecticut market can be expected from PCS licensees.

(vi) Specific allegations of fact (supported by affidavit of person with personal knowledge) regarding anti-competitive or discriminatory practices or behavior by commercial mobile radio service providers in the state.

In its September 1991 decision, the DPUC evaluated whether, under its own regulations, conditions had been met to allow elimination of rate regulation for wholesale cellular service in Connecticut. Among those conditions is the following:

> ... no abusive practices are being undertaken by carriers, including, but not limited to, predatory pricing and discriminatory pricing to subscribers....

Conn. Agencies Regs. § 16-250b-2(a)(3) (1993). In that 1991 decision, the DPUC concluded that "the Authority further notes that the record does not indicate any abusive practices are occurring." 1991 Decision, Docket No. 90-08-03, at 6 (Sept. 25, 1991).

In its August 8, 1994 Decision, however, the DPUC does an about-face on these issues, effectively recanting its own, approved wholesale cellular tariffs without even mentioning its contrary findings in 1991. Instead, the Decision begins discussion of this evidentiary criterion with one paragraph purportedly summarizing the rebuttal by Springwich and BAM of miscellaneous reseller complaints about alleged anti-competitive or discriminatory practices, followed by twelve lengthy paragraphs summarizing the reseller allegations. Decision at 22-26. In its assessment of the alleged anti-competitive behavior, again contrary to its unmentioned 1991 decision, the DPUC finds that the resellers have raised "specific examples of a non-competitive environment that requires further review

and regulation by the Department." Id. at 26.

The DPUC cites as the "worst example of anti-competitive behavior" the fact that there is little physical, managerial or corporate separation between the wholesale and retail arms of the cellular carriers. Id. at 26-27. Acknowledging that the DPUC has always been aware of the close relationship between the wholesale and retail operations of the carriers, the Decision lamely explains that at the time of its prior approval of that relationship that "we did not contemplate the current level of competition between Springwich's retail affiliate and the independent cellular resellers." Id. This effort at explaining why the DPUC did not find fault in the relationship between the carriers and their retail affiliates in prior decisions confounds logic. If the market has grown and competition has increased despite how the carriers have conducted their affiliated retail operations, and if the DPUC has approved that conduct in the past as it admits, then this "worst example of anti-competitive behavior" proves only the weakness of the rest of the DPUC's case for continued regulation.

Not surprisingly, the DPUC's proposed remedy for its concern about the wholesale/retail relationship will be a new docket in which the DPUC will investigate that relationship "and its impact on the degree of competition at the retail level." Id. at 27-28. There are several problems with this proposal. First, Connecticut does not regulate retail cellular service. See Conn. Gen. Stat. § 16-250b (1993). Even if the state wanted to commence regulation of retail cellular service and amended its statutes and regulations accordingly, the 1993 Budget Act

would preempt such regulation without prior Commission approval.

Second, the Commission does not share the DPUC's concern over the particular structure utilized for wholesale/retail operations, and specifically permits carriers to conduct retail operations even without creating separate subsidiaries. Cellnet, 965 F.2d at 1109-11. The absence of corporate and managerial separation between wholesale and retail operations of the cellular carriers clearly is not, without more, a per se anti-competitive or discriminatory practice. The Commission relies on the obligation of a wholesale carrier to provide service to independent resellers on a nondiscriminatory basis. See Bundling of Cellular Customer Premises Equipment & Cellular Service, 6 FCC Rcd 1719, 1726 (1991), aff'd, 965 F.2d 1106, 1110 (D.C. Cir. 1992).

The DPUC does not make any specific findings concerning actual abuse of the wholesale/retail relationship or discrimination against independent resellers, but merely expresses concern that economies of scale, common management, and pricing decisions may have an impact on competition at the retail level. Decision at 27. In fact, the only evidence in the record in support of an allegation of specific discriminatory behavior resulting from the wholesale/retail relationship consists of two, one-time events, one for each carrier. Springwich witnesses agreed that there had been a single instance involving early notification to their retail affiliate of a new service known as "ROAM USA," but added that Springwich has never shared customer information with its retail affiliate that is proprietary to the independent resellers or otherwise provided its affiliate with

advanced notification of any other wholesale promotions or new services. (Tr. 78-80.) BAM's witness also stated that there was only one instance in seven years where its retail arm utilized advanced knowledge as to a proposed new service -- a relatively minor enhancement to voice messaging. (Tr. 702-03.)

The allegation of coercion as to Springwich appeared in a statement of Mr. Escobar that Springwich wanted him to sign a "confidentiality agreement" not to discuss issues between Mr. Escobar's companies and SNET and Springwich at the DPUC.[3] Even if this allegation were true, Mr. Escobar testified that he refused to sign such an agreement, and Springwich did not otherwise attempt to restrict Mr. Escobar's participation before the DPUC. (Tr. 1683.) Moreover, neither Mr. Escobar nor any reseller produced the purported agreement.

As for the Decision's assertion that Springwich's customers "have been required to discuss their retail rates and competitive pricing strategies" with Springwich, which may have given Springwich's retail affiliate an unfair competitive advantage, again the transcript reference in the Decision does not support such an assertion. Rather, in the cited transcript Mr. McWay, another reseller witness, complained only that one individual who used to work for Springwich subsequently was transferred to Linx, its affiliated resale arm, and speculated that the individual might have taken with him some "competitive

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[3] The credibility of Mr. Escobar is subject to question because he was in the middle of a hostile bankruptcy proceeding with Springwich as his principal creditor. The evidence in that proceeding showed numerous inconsistencies in Mr. Escobar's testimony, and that had never filed federal excise returns, paid federal excise taxes, or paid personal income taxes on earnings from his resale business.